87-2063

No.

Supreme Court, U.S.
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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

CHARLES DANIEL - - - - - Petitioner

versus

EATON CORPORATION, et al. - - Respondent

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED

Whether the decision below conflicts with the decisions of other Courts of Appeals as to the proper interpretation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132 with respect to Plaintiff, Charles Daniel's right to a jury trial in the circumstances of his case.

*The parties to this proceeding whose judgment is sought to be reviewed are Eaton Corporation; Mellon Bank, Trustee for Eaton Corporation Pension Plan A-1; and Richard T. Kennedy, Plan Administrator, all of whom are Defendants and Charles Daniel, Plaintiff.

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CHARLES DANIEL - - - - - *Petitioner*

v.

EATON CORPORATION, Et Al. - - *Respondents*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

The Petitioner, Charles Daniel, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Sixth Circuit entered in this proceeding on February 9, 1988.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported appears in Appendix A hereto. Also included in the Appendix are the decisions of the United States District Court for the Western District of Kentucky (Appendix C), and Court of Appeals order for denying Appellee's Motion for Reconsideration.

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered February 9, 1988 (Appendix A).

The Court subsequently entered an order denying Appellees Motion for Reconsideration on March 17, 1988 (Appendix B). This petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

The Plaintiff, Charles Daniel, was born on August 13, 1933, the son of an illiterate blacksmith in Horse Branch, Kentucky. Charles did not receive the benefit of much formal education and in fact left school after the sixth grade to obtain work, because his family was financially depressed. He held various jobs (farmhand, sawmill worker, etc.) until he hired on at the Shuler Axel plant in Louisville in January of 1953.

Because he could not read or write, Charles obtained the assistance of family members, who completed his employment application for him. On January 5, 1953, Charles was hired and simultaneously became a member of the local union. Charles worked until March 25, 1953, when he was laid off; he was recalled on June 22, 1953; again laid off on August 17, 1953, and again recalled on May 3, 1954. Charles was employed continuously thereafter until he was placed on lay-off in December of 1982, as the Eaton Corporation, successor to Shuler Axel, proceeded to close the Louisville plant in February 1983.

Charles Daniel was hired once and only once on January 5, 1953. His proof was uncontradicted that he received no notice or communication of any kind

concerning any alleged termination on February 17, 1954. When he reported for work after being recalled from lay-off, on May 3, 1954, he was not in any way informed that he was being "rehired", he did not go through any re-employment process, he did not complete any new employment application, and at no time did he ever re-apply to become a Union member. Further, the company recognized Daniel's seniority rank in recalling him since no other person was hired during the time he was laid off until he was recalled in May of 1954.

At trial, Eaton, over Daniel's objection, introduced an unauthenticated photocopy of an alleged Collective Bargaining Agreement in effect on May 3, 1954.

This document contains inconsistent and ambiguous provisions insofar as Charles Daniel is concerned. On the one hand, at page 10, Section 9, it states:

> "Lay-offs shall affect seniority as follows: Employees on lay-off seniority list must contact the company by letter every (6) months during period of lay-off. Failure to comply with this provision automatically drops employee from seniority list. Employees on lay-off must properly notify company of any change of address."

On the other hand, at page 6 of the document, Section 3, it is stated:

> "Employee Discipline. The company, in directing the working force, may exercise its rights to invoke disciplinary measures for good cause, subject to the terms and conditions of this contract. Disci-

> plinary measures include reprimand, suspension and discharge . . . the Company will give the Union prior written notice in all cases of disciplinary action to be taken. Any dispute as a result of disciplinary action may be taken through the grievance procedure."

Eaton introduced no evidence to explain the intent or meaning of these provisions. There is no evidence as to what "automatically drops employee from seniority list" means. Further, there is no evidence whatsoever that the company gave any "prior written notice" of this severe disciplinary action, as provided in Section 3 of the alleged Collective Bargaining Agreement.

Eaton concedes that during his layoff Charles Daniel frequented the plant inquiring about his job status. Charles reported personally to the company office, speaking with the personnel manager, Mr. Sparks, during the lay-off time period in question. During these visits Daniel continually advised Mr. Sparks "I was interested in my job, coming back to work." In response to Charles' personal and oral notices of availability, Mr. Sparks responded "well, things ain't looking too good right now." At no time did Mr. Sparks ever suggest to Charles that reporting in person was insufficient to preserve his employment status or that it was necessary for Charles to write a letter to do so. Charles was led to believe his employment status was protected. In fact, it was not until 1982, when rumors of the plant closing circulated, that Charles learned

the company contended that he had failed to comply with an alleged notice provision back in 1954.

Charles then contacted the Union. Unfortunately, Eaton persisted in disputing that Charles was hired only once in January, 1953.

By letter dated June 21, 1983, Eaton forwarded to Counsel for Charles Daniel forms to be utilized in processing an administrative appeal of the denial of his early retirement benefits. On July 7, 1983, Daniel's counsel mailed a letter, the receipt of which was acknowledged at trial, to Mr. Richard T. Kennedy of the Eaton Corporation. Both Charles Daniel's appeal and his written request for the pension plan were ignored until Daniel finally was forced to file his Complaint in the United States District Court, on April 6, 1984. Finally, Eaton was galvanized into action, after Charles Daniel was forced to incur court costs and additional legal fees, and Eaton mailed the pension plan to Daniel's counsel on April 10, 1984, a delay of 308 days.

On October 15, 1984, this action came on for Pre-trial Conference in the Court's chambers. Charles Daniel and Eaton were represented by local Counsel, and the Court ordered, with no objection, that this action be assigned for trial "before the jury" on September 17, 1985, at 9:30 a.m. Thereafter, due to the illness of the Honorable Chief Judge Charles M. Allen, an Order was entered postponing the trial. An additional Pre-trial Conference was held on December 13, 1985, and again, with no objection, the Court ordered

this action set for trial by jury" on January 28, 1986, at 10:00 a.m.

On January 28, 1986, the parties appeared, by Counsel, for an additional Pre-trial Conference prior to commencement of jury selection. Eaton stipulated on the record "that it is a *de novo* trial" . . . so that the standard is not whether Eaton acted arbitrarily or capriciously but whether, in fact (Charles Daniel) is entitled to a pension, period." However, on its own motion the court ordered that this case be tried without a jury.

On May 19, 1986, the U.S. District Court for the Western District of Kentucky entered its Memorandum Opinion and Judgment dismissing Charles Daniel's claims for early retirement benefits under the pension plan and denying attorney fees thereon. However, the Court awarded Charles Daniel the sum of $6,950.00 together with interest as a penalty against Eaton for failure to furnish a copy of the pension plan and collective bargaining agreement (Memorandum Opinion, Order and Judgment, attached in Appendix C).

On June 13, 1986 Charles Daniel filed an appeal to the U.S. Court of Appeals for the Sixth Circuit seeking reversal of the District Court's judgment.

On February 9, 1988 the U.S. Court of Appeals for the Sixth Circuit remanded the case to the U.S. District Court for the Western District of Kentucky holding that the District Court erred in granting a trial *de novo* but affirming the District Court's denial of a

jury trial (See App. Opinion, pp. 7, 10). The Sixth Circuit also vacated the District Court's denial of attorney's fees but affirmed the $6,950.00 penalty assessed by the District Court against Eaton for failure to supply Daniel with a copy of the pension plan. (App. Op. p. 11).

Daniel seeks review by this Court of the portion of the Sixth Circuit's opinion holding that a *de novo* trial by jury was inappropriate.

REASONS FOR GRANTING THE WRIT

The decision below conflicts with the decisions of other Courts of Appeal as to the proper interpretation of the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1132 (Appendix D), as to Plaintiff, Charles Daniel's right to jury trial in the circumstances of his case.

The civil enforcement provision of the Employee Retirement Income Security Act (ERISA), §1132, creates no difficulty for the courts as to the interpretation of §1132(a)(3), which is commonly construed to provide equitable relief for violations or to enforce provisions of the act or terms of a pension plan. However, divergent interpretations have occurred construing §1132(a)(1)(B) as to whether or not a Plaintiff suing under the provision is entitled to a jury trial.

The decision below by the Sixth Circuit directly conflicts with the decision in *Pollock v. Castrovinci*, 476 F. Supp. 606 (S.D.N.Y. 1979), which was affirmed without opinion by the Second Circuit at 622 F. 2d 575 (2d Cir. 1980). *Pollock* involved a pension plan

which had been amended by a provision which allowed an employer to recover funds remaining after liabilities to participants had been met. An employee brought suit against the employer and the plan's trustee, under 29 U.S.C. §1132, alleging that they had violated their fiduciary responsibility by diverting assets for their own use. The court held that the issue concerning *reformation* of the pension plan was *equitable* and to be decided by the court, but if the employee prevailed on that issue, remaining issues concerning *benefits due* under the reformed plan were *legal* in nature and to be determined by a jury.

The court in *Pollock* reached its conclusion by determining that §1132 sets forth, *in the alternative, two remedies:* subsection (a)(3) creates a civil action for *equitable* relief and (a)(1)(B) creates a different civil action for *legal* relief. 476 F. Supp. at 608-609. This interpretation is contradictory to the opinion below and that of the Seventh Circuit in *Wardle* v. *Central States, Southeast, and Southwest Areas Pension Fund,* 627 F. 2d 820 (7th Cir. 1980) (Truck owner-operator brought action under ERISA challenging union pension fund trustees' denial of application for retirement benefits) where the court decided that *both* subsections (a)(3) and (a)(1)(B) provide for equitable relief, not legal relief. The only reason given by the Seventh Circuit for the distinction between the two subsections was its conclusion that Congress granted state courts concurrent jurisdiction only over (a)(1)(B) claims. *Id.* at 829.

As illustrated by *Wardle* the Circuit Courts of Appeal have further confused the right to jury trial issue under ERISA §1132(a)(1)(B) due to differing interpretations of Congressional intent. The court in *Pollock* held that the legislative history of ERISA indicated that §1132 actions should be guided by the case law developed under §185 of the Labor-Management Relations Act of 1947 (LMRA), 29 U.S.C. §185. The Court referenced the Joint Explanatory Statement of the Committee of Conference, which provides, in relevant part, as follows:

> "All such actions in Federal or State courts are to be regarded as arising under the laws of the United States in similar fashion to those brought under Section 301 of the Labor-Management Relations Act of 1947." (H.R. Conf. Rep. No. 93-1280, 93d Cong.).

Thus the *Pollock* Court held . . . "it is clear that, under Section 301 of the LMRA, an employee who sues for money damages under a collective bargaining agreement is entitled to a jury trial upon request." *Pollock,* 476 F. Supp. at 609. *Pollock's* view is in sharp contrast with the Fifth Circuit's interpretation in *Calamia* v. *Spivey,* 632 F. 2d 1235 (5th Cir. 1980), where the court thought the language of the quoted passage above manifested Congress' intention to authorize federal courts to develop a federal common law to govern ERISA just as they had developed a federal common law to govern claims under §185 of the Labor Act. *Id.* at 1237. The Seventh Circuit took the same view as the *Calamia* court in *Wardle,* 627 F. 2d at 829.

However, the Seventh Circuit adopted a view more in line with that expressed in *Pollock* with their decision in *Bugher* v. *Feightner,* 722 F. 2d 1356 (7th Cir. 1983). The Court stated:

> "However, a review of the statutory scheme and legislative history of ERISA demonstrates that 29 U.S.C. §1132(a)(3) was intended to supplement rather than supersede the rights existing under 29 U.S.C. §185(a)". *Id.* at 1359.

The court worked around its decision in *Wardle* by applying the above rationale, which allows for the possibility of a jury trial due to reference to §185 of the LMRA, *only* to claims under §1132(a)(3). *Wardle* "addressed a different subsection of 29 U.S.C. §1132 than we do here and involved a claim with a different historical background." *Id.* at 1360. Bugher involved the trustees of the union pension plan bringing suit under ERISA to recover delinquent contributions from the employer. The court determined that a legal remedy for breach of contract was available for the Plaintiff (violation of collective bargaining agreement). Applying 29 U.S.C. §185 the Court held the Plaintiff was entitled to a jury trial.

In *Wardle,* the Seventh Circuit construed suits by beneficiaries for pension benefits as equitable citing the law of trusts. *Wardle,* 627 F. 2d at 829. However, another district court opinion from the Southern District of New York, following *Pollock's* affirmation by the Second Circuit, reached a different conclusion. In *Paladino* v. *Taxicab Industry Pension Fund,* 588 F.

Supp. 37 (S.D.N.Y. 1984), a union member, Plaintiff sought a declaration with respect to his rights to receive pension benefits under ERISA.

> "This Court believes that on balance it was the intent of Congress that ERISA plan enforcement actions be regarded as legal in nature, and that litigants be entitled to a jury trial. Essentially, the right to a pension may be regarded as arising out of contract." *Id.* at 39.

The Court's interpretation of Congressional intent is at odds with the Fifth and Seventh Circuits' noted above, and further, its decision is in direct conflict with the Sixth Circuit's decision below. The court in *Paladino* noted that when a Plaintiff seeks to have a court review the exercise of fiduciary powers by trustees, the action is essentially equitable in nature.

> "However, beneath this seemingly equitable issue, there lurks a simple question: whether Plaintiff had a break in his service in the taxicab industry which forfeited his prior service credit. This represents a pure issue of fact and is the sort of question which is particularly appropriate for resolution by a trial jury." *Id.* at 39

This rationale is contradictory with the circuits noted above, and is contradictory with the decision below, which involved precisely the same issue: Whether Plaintiff had a break in his service in the industry. Such a question is particularly appropriate for trial by jury in this case as well.

CONCLUSION

For these reasons, a Writ of Certiorari should issue to review the judgment and opinion of the Sixth Circuit insofar as it denied Plaintiff a *de novo* trial by jury.

Respectfully submitted,

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APPENDIX

APPENDIX A

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 86-5664

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES DANIEL, - - - *Plaintiff-Appellant,*

v.

EATON CORPORATION, et al., - - *Defendants-Appellees.*

On Appeal from the United States District Court for the Western District of Kentucky

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Decided and Filed February 9, 1988

Before: LIVELY, Chief Judge; KENNEDY, Circuit Judge; and PECK, Senior Circuit Judge.

LIVELY, Chief Judge. The plaintiff, Charles Daniel, appeals from a judgment of the district court denying his demand for early retirement benefits from his former employer, defendant Eaton Corporation (Eaton). Because of the unsatisfactory state of the district court record, and procedural missteps, we must remand the case for further proceedings.

I.

Daniel was first hired by Shuler Axle Company of Louisville, Kentucky (Shuler) on January 5, 1953. After

several breaks in his employment, Daniel returned to work at Shuler on May 3, 1954, and worked continuously until he was placed on layoff in December 1982. The Louisville plant was closed on February 6, 1983. Shuler employees were represented by the United Auto Workers union (UAW) when Daniel was hired and throughout his employment. Eaton purchased Shuler during Daniel's period of employment, and Daniel was covered by "Pension Plan A-1 of the UAW Master Division" (the Plan) at the time of the Louisville plant's closing. The Plan provided that an employee is eligible for early retirement benefits if he has thirty or more years of "credited service" at the time he elects early retirement.

After learning of the plans to close the Louisville plant Daniel applied to Eaton for early retirement benefits. Following discussions between UAW and Eaton, William C. Rommel, the administrator of pensions for Eaton, advised UAW that Daniel had 29.2 years of credited service as of February 6, 1983. Thus, Daniel was not eligible for early retirement benefits under the Plan. The letter from Rommel stated that Daniel was fully vested under the Plan for retirement benefits upon reaching the normal retirement age of 65. Daniel was 49 years old when the plant closed.

Daniel objected to Eaton's calculation of 29.2 years of credited service. On June 21, 1983, Richard T. Kennedy of Eaton's employee relations staff wrote Daniel's attorney. In this letter Kennedy enclosed a form for an appeal of Eaton's determination to the Central Board of Administration for the Plan, a body composed of two members appointed by Eaton and two appointed by the UAW. Kennedy also set forth in detail the calculation of Daniel's years of credited past, future and broken service and Eaton's construction of the credited service provisions of the Plan. This letter disclosed that Eaton treated Daniel as a new hire as of May 3, 1954, and that its records desig-

nated Daniel a "voluntary quit" as of February 17, 1954, when he had been off work for six months without making a written request to return.

On July 7, 1983, Daniel's attorney acknowledged Kennedy's letter and requested copies of the Plan and the collective bargaining agreement in effect between the union and Shuler on February 17, 1954. On April 10, 1984, after Daniel had commenced this action, Kennedy provided a copy of the Plan to Daniel's attorney and advised that he had been unable to locate a copy of the collective bargaining agreement in effect in 1954.

II.

A.

Daniel filed suit on April 6, 1984, naming Eaton Corporation, Mellon Bank, Trustee under the plan and Richard T. Kennedy as defendants. The only basis of jurisdiction set forth in the complaint is section 502(e) of the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §1132(e) (1982). Daniel recited his dispute with Eaton over credited service and alleged that after Eaton had denied his application for early retirement benefits, he submitted an appeal on September 1, 1982, to the Central Board of Administration, but that no action had been taken on his appeal. In the complaint, Daniel stated that Richard T. Kennedy "has been an administrator of Pension Plan A-1."

In Count I of the complaint Daniel sought recovery from Eaton and Mellon Bank of all past due benefits with interest, and an order requiring Eaton and Mellon "to instate" Daniel as a beneficiary with a monthly pension of $935 and all fringe benefits provided under the Plan. In Count II Daniel asked the court to require Eaton and Kennedy to pay him a penalty of $100 per day pursuant to

§ 502(c)[1] of ERISA for failure to furnish a copy of the Plan within 30 days of his request. He also prayed for an award of attorney's fees and a jury trial.

In their amended answer the defendants admitted that Daniel was first hired on January 5, 1953, and was a participant in the Plan, but denied any wrongful acts or that their calculations were incorrect. They admitted that Kennedy had been an administrator of the Plan, but stated that he was no longer administrator. The answer also asserted affirmative defenses based on the alleged requirements of the 1954 collective bargaining agreement between Shuler and UAW that an employee in layoff status must make a written request to return to work every six months, and the Kentucky Statute of Limitations.

B.

Section 402(a)(1)(B) of ERISA provides that a participant or beneficiary of a plan may bring a civil action "to recover benefits due to him under the terms of his plan,

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[1]Section 502(c), 29 U.S.C. §1132(c), provides:

(c) Administrator's refusal to supply requested information

Any administrator (1) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title with respect to a participant beneficiary, or (2) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems proper.

to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]" Although Daniel cited section 502(a)(1)(B) in Count I, it is clear that he sought to recover from Eaton as his employer, not as the Plan administrator. The only reference to the Plan administrator is in Count II. In effect, Daniel sought to recover from Eaton for breach of contract, and this was the basis of his demand for a jury. Daniel also argued in the district court that Eaton was estopped to deny his entitlement to early retirement benefits on the basis of alleged activities of Shuler representatives during his layoff between August 17, 1953, and May 3, 1954. This argument is repeated on appeal.

The Plan provides for administration by the Central Board of Administration, heretofore referred to, and a Local Pension Committee at each plant, also consisting of four members, two each named by Eaton and the union. On February 28, 1983, the Local Pension Committee of the Louisville plant calculated Daniel's credited service as 29.2 years and authorized a deferred vested pension of $531.44 per month at age 65. (Plaintiff's Exhibit 4). The reflected the decision referred to in Rommel's letter of February 17th. Daniel appealed the determination of 29.2 years of credited service to the Central Board of Administration, but the appeal was never acted upon.

C.

The complaint did not name either the Local Pension Committee or the Central Board of Administration as a defendant. In *Barrett* v. *Thorofare Markets,* 452 F. Supp. 880 (W.D. Pa. 1978,) an action against the plaintiff's former employer for wrongful denial of early retirement benefits was dismissed on the employer's motion as having named the wrong party defendant. The court held that the pen-

sion committee was the only proper defendant against whom relief could be granted. The committee was responsible for administering and interpreting the plan and was solely responsible for a denial of benefits. *Id.* at 884. Unless an employer is shown to control administration of a plan, it is not a proper party defendant in an action concerning benefits. *Boyer* v. *J. A. Majors Company Employees' Profit Sharing Plan,* 481 F. Supp. 454, 457-58 (N.D. Ga. 1979). See also *Foulke* v. *Bethlehem 1980 Salaried Pension Plan,* 565 F. Supp. 882 (E. D. Pa. 1983) (employer's motion to dismiss denied because of evidence that it had taken an active part in administration of the plan).

Eaton did not seek dismissal of Daniel's claims against it. Instead, it advised the district court in a trial brief that "the only proper defendant here is Eaton Corporation as Plan Administrator." Although the record contains no inkling of how administration of the Plan was taken over by Eaton from the local Pension Committee and the Central Board of Administration, the district court and the parties proceeded on the basis of treating Eaton as the administrator.

III.

A.

We consider the Count I claim first. To the extent that Daniel sought recovery from Eaton for breach of contract or on the theory of promissory estoppel, such claims are preempted by ERISA, since these claims "arise from the administration of [the Plan]." *Blakeman* v. *Mead Containers,* 779 F. 2d 1146, 1151 (6th Cir. 1985); *Ellenberg* v. *Brockway, Inc.,* 763 F. 2d 1091, 1095 (9th Cir. 1985). With certain exceptions not material here, state law actions related to employee benefit plans are preempted by ERISA. Section 514(a), 29 U.S.C. § 1144(a). Common law causes

of action are preempted whether the state laws are specifically designed to affect employee benefit plans or not. *Pilot Life Insurance Co.* v. *Dedeaux*, ___ U.S. ___, 107 S. Ct. 1549, 1553 (1987). ERISA embodies a comprehensive civil enforcement scheme with respect to claims for employment benefits which "represents a careful balancing of the need for prompt and fair claims settlement procedures against the public interest in encouraging the formation of employee benefits plans." 107 S. Ct. at 1556. The preemption provision is integral to this scheme.

In view of Eaton's acceptance of responsibility for denial of Daniel's claim, the district court treated the entire action as one under ERISA and Eaton as the Plan's fiduciary acting through the Local Pension Committee and the Central Board of Administration.[2] However, instead of reviewing the denial of benefits by the administrator under an arbitrary and capricious standard, the district court granted the parties' request for a trial de novo. This was error. A plan administrator has broad discretion in deciding questions of coverage and eligibility for benefits. This court has held repeatedly that the appropriate determination in reviewing the decision of a plan administrator with respect to a claim for benefits is whether the decision was arbitrary, capricious, made in bad faith or otherwise contrary to law. *E. g., Adcock* v. *Firestone Tire and Rubber Co.*, 822 F. 2d 623, 626 (6th Cir. 1987); *Blakeman*, 779 F. 2d at 1149; *Moore* v. *Reynolds Metals Co. Retirement Program*, 740 F. 2d 454, 457 (6th Cir. 1984). We have specifically rejected arguments that de novo review is

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[2]Though designated as "trustee" in the Plan, Mellon Bank was actually only the depository of pension funds and the paying agent. It had no responsibility for determining entitlement to or amounts of benefits.

proper. *Adcock*, 822 F. 2d at 626; *cf. Crews* v. *Central States, etc. Pension Fund*, 788 F. 2d 332, (6th Cir. 1986).

The arbitrary and capricious standard of review is applied to these cases in order to avoid "excessive judicial interference with plan administration." *Cook* v. *Pension Plan for Salaried Employees*, 807 F. 2d 865, 870 (6th Cir. 1986) (quoting *Miles* v. *New York State Teamsters Conference Pension and Retirement Fund Employee Pension Benefit Plan*, 698 F. 2d 593, 599 (2d Cir.), *cert. denied*, 464 U. S. 829 (1983)). As Judge Engel pointed out in *Cook*, this deferential standard is applied "in most interest of efficient pension administration." 801 F. 2d at 871. Each application for benefits implicates the rights of other members of a plan, and the plan administrator views each case from this perspective. By upholding the decisions of an administrator that are rational in light of the plan's provisions and thus not arbitrary or capricious, the courts contribute to consistency and fairness in plan administration.

B.

The district court's agreement to the parties' request for a de novo trial was apparently grounded on the fact that the Central Board of Administration failed to render a decision on Daniel's appeal. Daniel sufficiently exhausted his administrative remedies by filing an appeal. However, the failure of the Central Board of Administration to act on his appeal did not give rise to a de novo action. Regulations of the Secretary of Labor promulgated pursuant to section 503 of ERISA, 29 U.S.C. § 1133, contain the following provisions:

> (h) *Decision on review.* (1) (i) A decision by an appropriate named fiduciary shall be made promptly, and shall not ordinarily be made later than 60 days after the plan's receipt of a request for review, unless

> special circumstances (such as the need to hold a hearing, if the plan procedure provides for a hearing) require an extension of time for processing, in which case a decision shall be rendered as soon as possible, but not later than 120 days after receipt of a request for review.

29 C.F.R. § 2560.503-1(h)(1)(i).

> (4) The decision on review shall be furnished to the claimant within the appropriate time described in paragraph (h)(1) of this section. If the decision on review is not furnished within such time, the claim shall be deemed denied on review.

29 C.F.R. § 2560.503-1(h)(4).

The Supreme Court stated in *Massachusetts Mutual Life Insurance Co.* v. *Russell*, 473 U. S. 134, 144 (1985), that this latter provision "enables a claimant to bring a civil action to have the merits of his application determined, just as he may bring an action to challenge an outright denial if benefits." When a review body fails to act and the claim is deemed denied on review, "[a] claimant's appropriate recourse is then to seek review of the denial by the district court." *Folke* v. *Schaffer*, 616 F. Supp. 1322, 1330 (D. Del. 1985). However, the standard of review is no different whether the appeal is actually denied or is deemed denied. The role of the district court is the same in either event. That role was described by the court in *Wardle* v. *Central States, Southeast and Southwest Areas Pension Fund*, 627 F. 2d 820, 824 (7th Cir. 1980), *cert. denied*, 449 U. S. 1112 (1981), as follows:

> A federal court is to focus on the evidence before the trustees at the time of their final decision and is not to hold a *de novo* factual hearing on the question of the applicant's eligibility. *Phillips* v. *Kennedy*, 542

F. 2d 52, 54 (8th Cir. 1976). As a general matter a court should not resolve the eligibility question on the basis of evidence never presented to a pension fund's trustees but should remand to the trustees for a new determination. *See id.* at 55 & n.10; *Sturgil* v. *Lewis*, 372 F. 2d 400 (D.C. 1966); *Pickett* v. *UMW Health & Retirement Funds*, 467 F. Supp, 2 (E.D. Tenn. 1978); *Ruth* v. *Lewis*, 166 F. Supp. 346, 349 (D.D.C. 1958).

In addition to the formal action of the Local Pension Committee, the record before the district court included the detailed explanation of reasons for denial of Daniel's application contained in Kennedy's letter of June 21, 1983, together with Daniel's employment records, a copy of the Plan, and the 1954 collective bargaining agreement which Eaton filed during the district court proceedings, although it is not clear whether the latter document was considered by the Local Pension Committee in its initial determination. The denial should have been reviewed by the district court under an arbitrary and capricious standard, taking into account the entire record before the administrator at the time of the determination that Daniel was not entitled to early retirement benefits.

C.

Daniel argues on appeal that the district court erred in denying his demand for a jury and in admitting into evidence an unauthenticated copy of the collective bargaining agreement in force between Shuler and UAW at the time of Daniel's 1953-54 layoffs and return to work. Having determined that Daniel's common law claims were preempted by ERISA, we conclude that the district court properly denied Daniel's demand for a jury . Although there may be actions under ERISA in which a jury trial is proper, in actions for recovery of benefits under section

502, "there is no right to a jury trial." *Crews*, 788 F. 2d at 338; *Foulke*, 565 F. Supp. at 883.

With respect to the collective bargaining agreement, if this agreement was not considered by the administrator in denying Daniel's claim, it should not have been considered by the court. If, however, the agreement was part of the record relied upon in making the original determination that Daniel did not qualify for early retirement benefits, we believe there were sufficient indicia of trustworthiness to make the copy admissible. Fed. F. Evid. 803(6) and (24).

IV.

The claim under Count II and the prayer for an attorney's fee were addressed to the district court's discretion. Section 502(c) provides that the administrator "may in the court's discretion" be liable to a plan participant or beneficiary "in the amount of up to $100 a day" for failure or refusal to comply with a request for information that the administrator is required to furnish. 29 U.S.C. § 1132(c). Section 502(g) provides that a district court "in its discretion may allow a reasonable attorney's fee" in any action under the subchapter of ERISA which includes section 502. 29 U.S.C. § 1132(g).

The district court awarded Daniel $25 per day for 278 days ($6,950) for Eaton's failure to supply a copy of the Plan as he had requested. Eaton has not appealed this award, but Daniel maintains that he was entitled to the full amount authorized by the statute—$100 per day. The district court accepted Eaton's explanation that the failure to respond to Daniel's request was not deliberate, but resulted from neglect or misfeasance. Further, the record casts doubt on any claim of prejudice to Daniel by reason of the delay. The complaint was filed before the Plan was

furnished, and after receiving the copy, the complaint was not amended. From this it appears that Daniel and his attorney had sufficient information to proceed without the copy. Obviously, Eaton should have responded promptly, and the district court assessed a penalty for Eaton's failure to do so. We cannot say that the district court abused its discretion in making an award that was below the statutory minimum.

The district court concluded that it would not be appropriate to award an attorney's fee since Daniel failed to prevail on his principal theory of recovery. Since we are remanding for a review of the record under a standard not originally applied by the district court, the result may be different on the Count I claim. Thus, we vacate the denial of an attorney's fee, and direct that this issue by reconsidered in light of the district court's determination of the Count I claim following remand.

Except for the award under § 502(c), which is affirmed, the judgment of the district court is vacated and the case is remanded for further proceedings consistent with this opinion. Eaton will bear the costs of this appeal.

APPENDIX B

No. 86-5664

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

CHARLES DANIEL, - - - - *Plaintiff-Appellant,*

v.

EATON CORPORATION, et al., - - *Defendants-Appellees.*

ORDER—Filed March 17, 1988

BEFORE: LIVELY, Chief Judge; KENNEDY, Circuit Judge; and PECK, Senior Circuit Judge.

The appellees have filed a document styled, "Motion for Reconsideration and BRIEF in Support of Appellee" in which they request the court to reconsider its original decision filed February 9, 1988, and issue an order remanding this case to the district court with directions to enter judgment in favor of Eaton Corporation. Upon consideration of the motion and brief, the court concludes that it neither overlooked nor misconstrued any issue in this case and, accordingly, the motion is denied. The fact that the district court applied a standard requiring greater deference to the administrator's determination than that directed to be applied by this court's decision is not determinative. The district court must apply the prescribed standard to a proper administrative record and its first duty on remand is to determine whether such a record exists, and if so, whether that record was before it upon the original submission.

The motion is denied.

Entered By Order of the Court

(s) John P. Hehman
Clerk

APPENDIX C

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action C 84-0368-L(A)

CHARLES DANIEL, - - - - - - - *Plaintiff*,

v.

EATON CORPORATION, et al., - - - *Defendants.*

FINDINGS OF FACT, CONCLUSIONS OF LAW AND MEMORANDUM OPINION

Plaintiff brings this action under the Employee Retirement Income Security Act of 1974, 29 U.S.C. §1001, *et seq.* (ERISA). Plaintiff seeks pension benefits in the amount of $13,090.00 as of the time his complaint was filed, together with a penalty of $27,800.00 under 29 U.S.C. §1132(c) for failure to furnish plaintiff with a copy of the pension plan and collective bargaining agreement for a period of 308 days after a request therefor.

This case is unusual in that the defendant has agreed that the correct standard of review in this case is a *de novo* trial on the facts and the law and not merely a determination of whether the trustee's actions were arbitrary and capricious. *Cf. Moore* v. *Reynolds Metals Co. Retirement P.*, 740 F. 2d 454 (6th Cir. 1984). However, the fact that the defendant acceded to such a standard of review does not change the equitable nature of this action. *E.g. Cowden* v. *Montgomery Co. Soc. for Cancer Control*, 591 F.

Supp. 740 (S.D. Ohio 1984); *Diano* v. *Central States, etc.*, 551 F. Supp. 861 (N.D. Ohio 1982). Hence, it was proper to deny the plaintiff's request for a jury in the trial held on January 28 and 29, 1986.

Plaintiff was employed by Shuler Axle Company initially on January 5, 1953, a company which was subsequently acquired by the defendant Eaton Corporation. He was then laid off on March 25, 1953 and recalled on June 22, 1953. He was again laid off on August 17, 1953 and came back to work on May 3, 1954. Since May 3, 1954, he had worked continuously with Shuler Axle and its successors in interest (including defendant) until December 1982, at which time the union and the defendant Eaton Corporation concurred in an argument which resulted in the closing down of the Louisville plant of Eaton Corporation in February 1983.

Plaintiff at all relevant times was a member of the United Automobile Workers (hereinafter UAW), which had a collective bargaining agreement with Shuler Axle Company and subsequently with its corporate successors. In 1985 Shuler Axle initiated a pension plan which was later taken over by defendant Eaton and which is known as Pension Plan A-1. Under the terms of that plan, any employee who has thirty years of credited service is entitled to early retirement benefits, which would amount to approximately $935.00 per month in plaintiff's case.

With reference to the proposition that plaintiff should have exhausted his remedies in 1954 through the grievance procedure set up under the collective bargaining agreement, we do not believe that this was required because the relationship between plaintiff's seniority rights and plaintiff's ERISA rights did not arise until 1969 when the first pension plan was adopted. Furthermore, we believe that Congress has provided two statutes which govern the rights of labor employees. We should give greater deference to

the ERISA provisions which contain a six-year statute of limitations particularly in light of the fact that plaintiff had no way of knowing that he would not meet the pension plan requirements of thirty years service until the plant suddenly closed after his completion of at least 29.1 years. *See Alexander* v. *Gardner-Denver Co.*, 415 U. S. 36 (1974) (holding in a similar context that an employee may bring his Title VII suit without having exhausted his remedies under a collective bargaining agreement).

The plaintiff contends that, although he did not actively work for the total thirty years, the defendant should have credited him with the periods of layoff during the years 1953 and 1954, thus crediting him to more than thirty years of service. The defendant contends that the layoff periods in 1953 and 1954 are not to be considered as time for which service credits are to be awarded and relies on the provision in the collective bargaining agreement[1] between Shuler and UAW to the effect that any employee covered under the collective bargaining agreement who was on layoff had to notify the employer (Shuler Axle) in writing at least once every six months of his intention to return to work when recalled. Defendant therefore contends that plaintiff was automatically terminated, and thus returned to work as a new employee.

Plaintiff admits that he did not comply with that provision of the collective bargaining agreement but contends that the defendant waived the requirement because, on several occasions during the period of his layoff between

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[1]The plaintiff's objection to the authenticity of the admitted photocopy of the collective bargaining agreement is without merit. That copy of the collective bargaining agreement, obtained from a former employee, satisfied the three requirements of Rule 901 (b)(8) of the Federal Rules of Evidence. To the extent that the plaintiff could assert any hearsay objection, Rule 803(16) is likewise applicable.

August 17, 1953 and May 3, 1954, he went to the office of Shuler Axle and advised the personnel officers that he desired to return to work. Plaintiff testified that he was not told that he had to file a letter nor that he had to do so every six months.

The records of Shuler Axle support defendant's position and indicate that when plaintiff returned to work in August 1954, he was hired as a new employee and that the reason for his status being that of a new hired was that he had not given written notice during the nine months he was on layoff of his intent to return to work if recalled. The evidence, although circumstantial in nature, is strongly to the effect that the defendant also posted seniority lists at its Louisville plant, and plaintiff admitted that he knew that one or two of the seniority lists had been posted. The evidence also reflects that the defendant company had a policy of mailing to each employee under the Pension Plan a document which indicated the number of years that each employee had accumulated of credited time in connection with their rights under the pension plan. There was no direct evidence as to the mailing since no registered mail was sent, and plaintiff denies that he ever received any such notice.

Plaintiff asserts that he did not discover that his seniority date was computed by the defendant to be August 15, 1954 until 1982 when the subject of closing the plant in Louisville came up. That assertion is almost incredible in light of the fact that seniority is all important to union members, and that plaintiff himself admits that his seniority enabled him to bump other employees, and his lack of it in certain instances allowed them to bump him.

Plaintiff also relies upon the doctrine of equitable estoppel to sustain his claim that he is entitled to be treated as an employee who had thirty years of service. In that

connection, it was established that plaintiff, during the period of his layoff from August 17, 1953 to May 3, 1954 (a period of some eight and on-half months), was in the office of the defendant company on many occasions and that he inquired about his job status. In response to those inquiries, plaintiff testified that all Mr. Sparks would ever say was that "things aren't looking too good right now." T.E. 41. He also stated that Mr. Sparks never told him anything about writing any letter or that he had to report in person.

In the cases of *Rosen* v. *Hotel and Restaurant Emp.*, 637 F. 2d 592 (3rd Cir. 1981), *cert. denied*, 454 U. S. 898 (1981), and *Kann* v. *Keystone Resources, Inc.*, 575 F. Supp. 1084 (W.D. Pa. 1983), it was held that the doctrine of equitable estoppel applies in cases brought under ERISA. However, in order for a plaintiff to prevail under the doctrine of equitable estoppel, plaintiff must prove: first, that by acts, representations or silence of the defendant he was induced to believe certain facts; second, that the defendant expected him to act upon those representations; and third, that the defendant, as the silent party, or as the party making the representations, possessed actual or constructive knowledge of the true facts.

In the case at bar, plaintiff was talking to the personnel man for the defendant and had definitely told him that he was interested in coming back to work. Plaintiff was a man with a sixth grade education and apparently did not realize in 1954 that he had to file a letter indicating his desire to return after being on layoff more than six months. It is true that he did not inquire specifically as to whether there were any requirements imposed upon him in order to maintain his seniority, such as the writing of a letter before six months of layoff had gone by. If he had inquired of Mr. Sparks as to whether there was a requirement to write the letter, then the duty of Mr. Sparks to inform

plaintiff of the obligation to write the letter would have been evident. However, Mr. Sparks, not being asked about the letter, could not have expected the plaintiff to rely upon his silence. Therefore, the first and second prongs of the equitable estoppel test have not been met by the plaintiff and his theory of recovery under that principle of law is not established.

Plaintiff further contends that he is entitled to be credited with thirty years service even if the May 1954 seniority date is the applicable date. Plaintiff relies upon a provision contained on page 30 of the pension agreement which states:

> If an employee retires . . . on or after January 1, 1969, and was absent from active work with the Corporation . . . prior to such retirement . . . because of either a layoff or a disability leave of absence . . . , such employee shall be credited with 40 hours for each complete calendar week of such continuous absence commencing (i) . . . on or after January 1, 1969 which occurs during any calendar year during which such employee shall have received pay from the Corporation for at least 170 hours but fewer than 1,700 hours. *id.*

Plaintiff testified that he was entitled to six weeks vacation pay in 1983. Plaintiff contends therefore that under the section of the plan cited above and under a section entitled "Hours of Service," he should be credited with a full year for 1983. The latter section reads as follows:

> Hours of service, as defined, shall include each hour for which an employee is paid or entitled to payment for the performance of duties for the corporation during any applicable computation period and (b) Each hour for which an employee is paid or entitled to pay-

ment by the corporation during any applicable computation period on account of a period of time during which no duties are performed for the corporation irrespective of whether the employment relationship is terminated due to vacation, holiday, illness, incapacity, et cetera, other items. T.E. 149.

The record reflects, however, that plaintiff was placed on layoff on December 3, 1982 and the plant was officially shut down and the collective bargaining agreement expired as of February 6, 1983. According to Mr. Rommel, a witness for the defendant who drafted the pension plan, plaintiff received credit for the period of layoff between January 1, 1983 and February 6, 1983. Mr. Rommel also testified that plaintiff could not have received any additional credit beyond February 6, 1983. Mr. Rommel did testify, however, that if an employee worked for more than 170 hours in any calendar year and then was on layoff the remainder of the year, he would be given a full year of pension.

The provisions contained in the pension agreement on page 30, paragraph 3 and the "Hours of Service" provision do not require that the plaintiff actually worked during the year 1983. The only explicit provision is that the plaintiff shall have received pay from the corporation for at least 170 hours. However, the inference to be drawn from the provision on page 30 is that there must have been some absence from active work during the calendar year when the layoff occurred. If the clause were construed as plaintiff contends it should be, then every worker who retired or who was terminated from the company when the plant was closed in February 1983 would receive a full year's pension merely because they had been paid a salary for one-tenth of a year even while not working for the company. We believe that result to be unsound and contrary to common sense.

Finally, although we hold that although plaintiff is not entitled to any recovery of retirement benefits, he is entitled to recover $25 per day for a period of 278 days because of the failure of the defendant to supply him with a copy of the pension plan which he had requested. 29 U.S.C. §1132(c); *Porcellini* v. *Strassheim Printing Co., Inc.*, 578 F. Supp. 605 (E.D. Pa. 1983); *LeFebre* v. *Westinghouse Elec. Corp.*, 549 F. Supp. 1021 (D. Md. 1982).

In *Porcellini, supra*, the district court used the following language which is relevant to the case at bar:

> Where the delay in furnishing requested information is the result of neglect or misfeasance, then a court might consider an award of damages less severe than the statutory maximum of $100.00 per day. Thus, an administrator who violates the express obligations imposed by the statute should not be able to escape the statutory penalty merely because the plaintiff cannot prove harm. 578 F. Supp. at 614.

Cf. Wesley v. *Monsanto Co.*, 554 F. Supp. 93 (E.D. Mo. 1982); *Shlomchik* v. *Retirement Plan of the Amalgamated Insurance Fund*, 502 F. Supp. 240 (E.D. Pa. 1980) (courts declined award under §1132(c) where retiree was not prejudiced); and *Bonin* v. *American Airlines, Inc.*, 562 F. Supp. 896 (N.D. Tex. 1983) (court exercised discretion not to assess a §1132(c) penalty against nonfeasant defendant). The Court believes that the reasoning in *Porcellini* is more persuasive and that the amount previously discussed, which is less than the statutory maximum, should be assessed.

Next, we consider the question of whether of not plaintiff should be awarded an attorney's fee. Title 32 U.S.C. §1132(g) states that, "[i]n any action under this subchapter (other than an action described in paragraph (2) by a participant, beneficiary, or fiduciary, the court in its discretion *may* allow a reasonable attorney's fee and costs

of action to either party." 29 U.S.C. §1132(g) (emphasis added). The case law also indicates that the court may, in its discretion, award or deny attorneys fees under the statute. While we agree with much of the reasoning in *Porcellini* we are if the opinion that, since plaintiff failed to prevail on the merits of his principal theory of recovery, whereas *Porcellini* recovered all of the benefits he sought, it would not be appropriate to award an attorney's fee. *Sapper* v. *Lenco Blade, Inc.*, 704 F. 2d 1069, 1073 (9th Cir. 1983) (*quoting Hummel* v. *S. E. Rykoff & Co.*, 634 F. 2d 446, 453 (9th Cir. 1980); *Iron Workers Local No. 272* v. *Bowen*, 624 F. 2d 1255, 1266 (5th Cir. 1980); *Eaves* v. *Penn*, 587 F. 2d 453, 465 (10th Cir. 1978).

We have this day entered a judgment in favor of the plaintiff in the principal amount of $6,950.00.

Dated _____

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

IN THE

UNITED STATES DISTRICT COURT

FOR THE WESTERN DISTRICT OF KENTUCKY
AT LOUISVILLE

Civil Action C 84-0368-L(A)

CHARLES DANIEL, - - - - - - - *Plaintiff,*

v.

EATON CORPORATION, et al., - - - *Defendants.*

JUDGMENT—Entered May 19, 1986

This action having been tried before the Court, and the Court having entered its findings of fact, conclusions of law and memorandum opinion, and being fully advised in the premises,

IT IS ORDERED AND ADJUDGED that plaintiff's claims against defendants, Richard T. Kennedy and Mellon Bank be, and hereby are, dismissed with prejudice.

IT IS FURTHER ORDERED AND ADJUDGED that the plaintiff, Charles Daniel, receive from the defendant Eaton Corporation the sum of $6,950.00, together with interest at the rate of ____% per annum from the date of judgment until paid.

IT IS FURTHER ORDERED that the plaintiff recover his costs herein expended from defendant, Eaton Corporation, but that plaintiff's motion for an attorney's fee is denied.

This is a final and appealable judgment, and there is no just cause for delay.

Dated _____

(s) Charles M. Allen
Charles M. Allen, Senior Judge

cc: Counsel of Record

APPENDIX D

§ 1132. Civil enforcement

(a) Persons empowered to bring a civil action

A civil action may be brought—

(1) by a participant or beneficiary—

(a) for the relief provided in subsection (c) of this section, or

(B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan;

(2) by the Secretary, or by a participant, beneficiary or fiduciary for appropriate relief under section 1109 of this title;

(3) by a participant, beneficiary, or fiduciary (A) to enjoin any act or practice which violates any provision of this subchapter or the terms of the plan, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provisions of this subchapter or the terms of the plan;

(4) by the Secretary, or by a participant, or beneficiary for appropriate relief in the case of a violation of 1025(c) of this title;

(5) except as otherwise provided in subsection (b) of this section, by the Secretary (A) to enjoin any act or practice which violates any provision of this subchapter, or (B) to obtain other appropriate equitable relief (i) to redress such violation or (ii) to enforce any provision of this subchapter; or

(6) by the Secretary to collect any civil penalty under subsection (i) of this section.

(b) Plans qualified under Internal Revenue Code; maintenance of actions involving delinquent contributions

(1) In the case of a plan which is qualified under section 401(a), 403(a), or 405(a) of Title 26 (or with respect to which an application to so qualify has been filed and has not been finally determined) the Secretary may exercise his authority under subsection (a)(5) of this section with respect[1] to a violation of, or the enforcement of, parts 2 and 3 of this subtitle (relating to participation, vesting, and funding), only if—

(A) requested by the Secretary of the Treasury, or

(B) one or more participants, beneficiaries, or fiduciaries, of such plan request in writing (in such manner as the Secretary shall prescribe by regulation) that he exercise such authority on their behalf. In the case of such a request under this paragraph he may exercise such authority only if he determines that such violation affects, or such enforcement is necessary to protect, claims of participants or beneficiaries to benefits under the plan.

(2) The Secretary shall not initiate an action to enforce section 1145 of this title.

(c) Administrator's refusal to supply requested information

Any administrator who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such fail-

ure or refusal, and the court may in its discretion order such other relief as it deems proper.

(d) Status of employee benefit plan as entity

(1) An employee benefit plan may sue or be sued under this subchapter as an entity. Service of summons, subpena, or other legal process of a court upon a trustee or an administrator of an employee benefit plan in his capacity as such shall constitute service upon the employee benefit plan. In a case where a plan has not designated in the summary plan description of the plan an individual as agent for the service of legal process, service upon the Secretary shall constitute such service. The Secretary, not later than 15 days after receipt of service under the preceding sentence, shall notify the administrator or any trustee of the plan of receipt of such service.

(2) Any money judgment under this subchapter against an employee benefit plan shall be enforceable only against the plan as an entity and shall not be enforceable against any other person unless liability against such person is established in his individual capacity under this subchapter.

(e) Jurisdiction

(1) Except for actions under subsection (a)(1)(B) of this section, the district courts of the United States shall have exclusive jurisdiction of civil actions under this subchapter brought by the Secretary or by a participant, beneficiary, or fiduciary. State courts of competent jurisdiction and district courts of the United States shall have concurrent jurisdiction of actions under subsection (a)(1)(B) of this section.

(2) Where an action under this subchapter is brought in a district court of the United States, it may be brought in the district where the plan is administered, where the

breach took place, or where a defendant resides or may be found, and process may be served in any other district where a defendant resides or may be found.

(f) Amount in controversy; citizenship of parties

The district courts of the United States shall have jurisdiction, without respect to the amount in controversy or the citzenship of the parties, to grant the relief provided for in subsection (a) of this section in any action.

(g) Attorney's fees and costs; awards in actions involving delinquent contributions

(1) In any action under this subchapter (other than an action described in paragraph (2)) by a participant, beneficiary, or fiduciary, the court in its discretion may allow a reasonable attorney's fee and costs of action to either party.

(2) In any action under this subchapter by a fiduciary for or on behalf of a plan to enforce section 1145 of this title in which a judgment in favor of the plan is awarded, the court shall award the plan—

(A) the unpaid contributions,

(B) interest on the unpaid contributions,

(C) an amount equal to the greater of—

(i) interest on the unpaid contributions, or

(ii) liquidated damages provided for under the plan in an amount not in excess of 20 percent (or such higher percentage as may be permitted under Federal or State law) of the amount determined by the court under subparagraph (A),

(D) reasonable attorney's fees and costs of the action, to be paid by the defendant, and

(E) such other legal or equitable relief as the court deems appropriate.

For purposes of this paragraph, interest on unpaid contributions shall be determined by using the rate provided under the plan, or, if none, the rate prescribed under section 6621 of Title 26.

(h) Service upon Secretary of Labor and Secretary of Treasury

A copy of the complaint in any action under this subchapter by a participant, beneficiary, or fiduciary (other than an action brought by one or more participants or beneficiaries under subsection (a)(1)(B) of this section which is solely for the purpose of recovering benefits due such participants under the terms of the plan) shall be served upon the Secretary and the Secretary of the Treasury by certified mail. Either Secretary shall have the right in his discretion to intervene in any action, except that the Secretary of the Treasury may not intervene in any action under part 4 of this subtitle. If the Secretary brings an action under subsection (a) of this section on behalf if a participant or beneficiary, he shall notify the Secretary of the Treasury.

(i) Administrative assessment of civil penalty

In the case of a transaction prohibited by section 1106 of this title by a party in interest with respect to a plan to which this part applies, the Secretary may assess a civil penalty against such party in interest. The amount of such penalty may not exceed 5 percent of the amount involved (as defined in section 4975(f)(4) of Title 26); except that if the transaction is not corrected (in such manner as the Secretary shall prescribe by regulation, which regulations shall be consistent with section 4975(f)(5) of Title 26) within 90 days after notice from the Secretary (or such

longer period as the Secretary may permit), such penalty may be in an amount not more than 100 percent of the amount involved. This subsection shall not apply to a transaction with respect to a plan described in section 4975(e)(1) of Title 26.

(j) Direction and control of litigation by Attorney General

In all civil actions under this subchapter, attorneys appointed by the Secretary may represent the Secretary (except as provided in section 518(a) of Title 28), but all such litigation shall be subject to the direction and control of the Attorney General.

(k) Jurisdiction of actions against the Secretary of Labor

Suits by an administrator, fiduciary, participant, or beneficiary of an employee benefit plan to review a final order of the Secretary, to restrain the Secretary from taking any action contrary to the provisions of this chapter, or to compel him to take action required under this subchapter, may be brought in the district court of the United States for the district where the plan has its principal office, or in the United States District Court for the District of Columbia.

NO. 2083

Supreme Court, U.S.
FILED
JUL 14 1988
JOSEPH F. SPANIOL, JR.
CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

CHARLES DANIEL . . . . . .PETITIONER

v.

EATON CORPORATION, et al . .RESPONDENT

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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RULE 28.1 LISTING

Cutler-Hammer Astralia Pty. Limited
Equipamentos Eaton Limitada
Eaton Copntroles Industriales S.A.
Eaton Technologies S.A.
Societe Mobiliere de Chessy S.A.
Carpano et Pons S.A.
Eaton Technologies Limited
Eaton S.p.A.
Eaton EST S.p.A.
Eaton Controls S.p.A.
Eaton Automotives S.p.A.
Eaton Engine Lifters S.p.A.
Condura, S.A. de C.V.
Cutler-Hammer Mexicana, S.A.
Eaton Finance N.V.
Cutler-Hammer New Zealand Limited
Cutler-Hammer Nigeria Limited
Eaton S.A.
Productos Eaton Livia S.A.
Eaton Svenska Aktiebolag
Eaton Limited
Cutler-Hammer Europa Limited

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. _____

CHARLES DANIEL - - - - - - - - - -Petitioner

v.

EATON CORPORATION, et al - - - - -Respondent

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINION BELOW

The decision of the United States Court of Appeals for the Sixth Circuit is reported at 839 F. 2d 263 (1988).

STATEMENT OF THE CASE AND FACTS

Petitioner seeks to qualify for early retirement pension benefits under an

employee pension plan of which he is a beneficiary. The administrator of the pension plan determined that Petitioner was not eligible under the terms of the plan and therefore denied his request for early retirement. After exhausting his administrative remedies, Petitioner sought review in federal court under the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001, et seq. ("ERISA"). The district court permitted de novo review of Petitioner's case but denied his request for a jury trial. The Sixth Circuit Court of Appeals held that it was an error for the district court to grant de novo review but affirmed the denial of Petitioner's request for a jury trial. Petitioner now seeks certiorari, claiming a conflict in the circuits respecting his right to a de novo trial by jury.

The dispute over Petitioner's eligibility for early retirement benefits centered on a determination of the proper "start date" of Petitioner's employment for the purposes of calculating the correct number of years of "credited service." Petitioner is covered by a pension plan under which an employee with thirty years of credited service is entitled to early retirement benefits.

Shuler Axel Company ("Shuler") initially hired Petitioner on January 5, 1953. (Tr. 35) Eaton Corporation ("Eaton") acquired Shuler on July 31, 1958. (Tr. 120) From the time that Petitioner was hired, and throughout his employment, Shuler employees were represented by the United Auto Workers union ("UAW"). (Tr. 118) Under a contract between the UAW and Shuler, laid-off employees were required to

contact the company by letter every six months during the lay-off period to indicate an interest in continued employment. (Tr. 111) Petitioner was laid off on August 17, 1953. Although he was subsequently rehired on May 3, 1954, Petitioner admits that during that lay-off period of over fifteen months he never sent a letter to Shuler as required by the collective bargaining agreement. (Tr. 38) On February 17, 1954 (six months after he was laid off), Petitioner was listed in Shuler's employment records as a "voluntary quit" because of his failure to notify the company as required under the contract. (Tr. 115) Therefore, when Petitioner returned to work on May 3, 1954, Shuler considered him to be a "new hire" and both Shuler and Eaton continuously, until the plant closed, recorded his seniority date as May 3, 1954. (TR. 116) No challenge to the

"incorrect" seniority date was ever raised by Petitioner until after the plant closed twenty-eight (28) years after his re-hire date. (Tr. 57, 59) Petitioner worked continuously from the date of his rehire until he was laid off in December of 1982.

Petitioner was covered by a pension plan known as Plan A-1 of the UAW Master Division Plan ("Plan"). (Tr. 101) The Plan was administered by the Central Board of Administration and by a Local Pension Committee at each plant. Under the Plan, an employee with thirty years of credited service was eligible for early retirement. (Tr. 105)

On February 6, 1983, the plant was closed. After learning of the pending plant closing, Petitioner applied for early retirement benefits. The Local Pension Committee calculated Petitioner's credited service as 29.2 years (Tr. 123) and held Petitioner did not qualify for

early retirement which required thirty (30) years of credited service.

Petitioner objected to the Plan Administrator's calculation of 29.2 years of credited service. Thereafter, the Plan Administrator ("Administrator") sent a letter to Petitioner explaining in detail the calculation of Petitioner's credited service. The letter disclosed that Petitioner was considered a new hire as of May 3, 1954, and that company records showed Petitioner was a "voluntary quit" on February 17, 1954, because Shuler had received no written request from him to return to employment after six months of lay-off. (Defendant's Exhibit 8) Enclosed with the Administrator's letter was a form for appealing the Administrator's determination to the Central Board of Administration for the Plan. Daniel appealed to the Central

Board of Administration, but the appeal was not acted upon.

Petitioner brought suit, disputing the Administrator's calculation of credited service, claiming that his proper "start date" should be January 5, 1953, rather than May 3, 1954.[1] Petitioner alleged that after the denial of his application for early retirement, he submitted an appeal to the Central Board of Administration, but that no action had been taken on his appeal.

---

[1] Petitioner's attorney requested copies of the Plan and of the collective bargaining agreement that was in effect between Shuler and the UAW on February 17, 1954. Eaton was unable to locate a copy of the collective bargaining agreement, but did send a copy of the Plan. Because there was a 278-day delay in sending a copy of the Plan, a district court awarded Petitioner $6,950.00 pursuant to the civil enforcement provisions of ERISA § 502(c), 29 U.S.C. § 1132(c). Eaton has not appealed this award.

In his complaint, Petitioner named Eaton rather than the Central Board of Administration or the Local Pension Committee. Nevertheless, the trial court and Eaton proceeded on the basis of treating Eaton as the Administrator of the Plan. The district court permitted a de novo trial because Eaton had not acted on Petitioner's administrative appeal but denied Petitioner's request for a jury trial. (Tr. 4, 12-13)

On appeal, the Sixth Circuit Court of Appeals held that the district court erred in granting a de novo trial but was correct in denying the request for a jury trial. Daniel v. Eaton, 839 F. 2d 263, 267 (6th Cir. 1988). The Sixth Circuit reasoned that it did not matter that the Central Board of Administration failed to act on Daniel's appeal because, under regulations promulgated by the Secretary

of Labor pursuant to ERISA § 503, 29 U.S.C. § 1133, if a decision upon review is not provided to a claimant within 120 days, "the claim shall be deemed denied on review." Id. (citing 29 C.F.R. § 2560.503-1(h)(4)). The Sixth Circuit determined that Petitioner had exhausted his administrative remedies and that Petitioner's claim was "deemed denied on review." Therefore, the district court should have reviewed the Administrator's decision under an arbitrary and capricious standard, taking into account the entire record before the Administrator at the time of determination. Id. at 268. The Sixth Circuit then remanded the case to the district court for review of the record under the proper standard of review.

Petitioner has filed a Petition for Writ of Certiorari, claiming that a

conflict exists among the courts of appeals regarding a claimant's right to a jury trial in cases such as his. Specifically, Petitioner claims that he is entitled to a de novo trial by jury.

REASONS FOR DENYING THE WRIT

I. PETITION SHOULD NOT BE GRANTED BECAUSE THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS REGARDING A BENEFICIARY'S RIGHT TO A JURY TRIAL IN A CLAIM FOR PENSION BENEFITS.

Petitioner has asked this Court to grant certiorari because he claims that there is a conflict among the courts of appeals. Such a conflict, however, does not exist. In addition to the Sixth Circuit in its opinion below, seven circuits have addressed the issue and all agree that there is no right to a jury trial in an action where the beneficiary of a pension fund sues the pension trustee for benefits due under the trust. See

Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820, 830 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981); Calamia v. Spivey, 632 F.2d 1235, 1237 (5th Cir. 1980); Turner v. CF&I Steel Corp., 770 F.2d 43, 47 (3rd Cir. 1985), cert. denied, 474 U.S. 1058 (1986); Katsaros v. Cody, 744 F.2d 270, 278 (2d Cir.), cert. denied, 469 U.S. 1072 (1984); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985); Blau v. Del Monte Corp., 748 F.2d 1348, 1357 (9th Cir. 1984), cert. denied, 474 U.S. 865 (1985); In re Vorpahl, 695 F.2d 318, 322 (8th Cir. 1982).

The court of appeals to first address the issue was the Seventh Circuit in Wardle. The court held that suits for pension benefits by disappointed applicants are equitable and that ERISA does not grant plaintiff a right to a jury

trial. Wardle, 627 F.2d at 830. Each of the seven appellate court opinions decided after Wardle, including the Sixth Circuit in the opinion below, has agreed with the Seventh Circuit's position, citing Wardle for support. The most recent case, prior to the Sixth Circuit's opinion below, was decided by the Third Circuit in Turner v. CF&I Steel Corp., 770 F.2d 43 (3rd Cir. 1985), cert. denied, 474 U.S. 1058 (1986). That court also found no right to a jury trial, stating: "[t]he Courts of Appeals have almost uniformly agreed that jury trials are not available to resolve claims of the type presented here." Id. at 46. To support its claim, the Third Circuit cites opinions by the Second, Fourth, Fifth, Seventh, Eighth, and Ninth Circuits. See id. at 46-47.

The Sixth Circuit, in its opinion below, agrees with the seven other courts of appeals addressing the issue presented

here. See Daniel, 839 F. 2d at 268. It is clear, therefore, that the courts of appeals are in harmony on this issue and that a conflict among the circuits does not exist.

Petitioner attempts to create a conflict among the circuit courts by referring to two trial court opinions from the Southern District of New York that were superseded by a later Second Circuit decision. Petitioner relies primarily on Pollock v. Castrovinci, 476 F. Supp. 606 (S.D.N.Y. 1979), aff'd without opinion, 622 F.2d 575 (2d Cir. 1980). Petitioner also cites Paladino v. Taxicab Industry Pension Fund, 588 F. Supp. 37 (S.D.N.Y. 1984), a case which followed Pollock. Both cases found a right to a jury trial in suits by beneficiaries for pension benefits.

Petitioner, however, has overlooked a later Second Circuit decision that

squarely addresses the issue presented here. See Katsaros v. Cody, 744 F.2d 270 (2d Cir.), cert. denied, 469 U.S. 1072 (1984). In Katsaros, the court declined to follow Pollock and explained that the jury issue in Pollock was moot by the time of the appeal because no trial was held in that case. Id. at 279. Therefore, when Pollock was affirmed without opinion by the Second Circuit, the issue of a right to jury trial was not before the court. The Katsaros court clearly stated: "[g]iven what we view as the essentially equitable nature of Pollock's claim, we decline to follow the District Court's mooted ruling that a jury was required." Id. Katsaros therefore supersedes the district court's opinions in both Pollock and Paladino. The Katsaros opinion states the position of the Second Circuit, and because that position agrees with those of the other courts of appeals, there is no

conflict among the circuits on the issue presented here.[2]

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[2] In a recent case, one New York district court permitted a jury trial for a claim under ERISA by distinguishing its case from the otherwise binding opinion of the Second Circuit in Katsaros. See Abbarno v. Carborundum, 682 F. Supp. 179, 180-82 (W.D.N.Y. 1988). The Abbarno court thought that Katsaros did not create a per se rule against jury trials in all ERISA actions. Therefore, the trial court granted a request for a jury trial where plaintiff sought an award of damages for the non-payment of benefits, which the court viewed as an essentially legal claim. Id. at 181. The court said that absent a "clearer statement" from the Second Circuit, it would permit a jury in such a case. Id.

The district court opinion in Abbarno, of course, does not bind the Second Circuit, nor does it speak for the Second Circuit. However, even if Abbarno is correct, that case is distinguishable from Petitioner's case below. The Abbarno court said that plaintiffs' claim was legal because "they seek an award of damages for non-payment of benefits." Id. (emphasis supplied) The case below, however, is not a claim for damages, but instead involves a determination of what benefits plaintiff is entitled to receive from a pension fund. The Second Circuit in Katsaros, in agreement with the other courts of appeals, held that such actions are in equity and that a jury trial is not required. Katsaros, 744 F.2d at 279.

Petitioner also looks to the Seventh Circuit for examples of supposedly "confused" case law. He cites Wardle as denying a jury trial in ERISA cases and then cites Bugher v. Feightner, 722 F.2d 1356 (7th Cir. 1983), cert. denied, 469 U.S. 822 (1984), as permitting a jury trial in such cases. Petitioner has failed to perceive a crucial distinction between these two cases. Wardle was a suit by a beneficiary for benefits under a pension fund. Bugher, on the other hand, was a suit by pension fund trustees against an employer for delinquent payments owed by that employer under the provisions of a collective bargaining agreement. Wardle involved the review of a trustee's decision in administering a trust; Bugher was simply a contract dispute. The Seventh Circuit is obviously not confused by the two cases because in Bugher the court clearly stated: "[o]ur

holding herein does not conflict with this court's decision in [Wardle]." Bugher 722 F.2d at 1361.

II. PETITIONER WAS NOT ENTITLED TO A DE NOVO TRIAL TO REVIEW HIS ELIGIBILITY FOR PENSION BENEFITS.

Despite the unanimity of the courts of appeals in denying a jury trial in suits by beneficiaries for pension benefits, Petitioner claims he is still entitled to a jury trial, apparently because the parties to the case stipulated to a de novo trial. The Sixth Circuit held that permitting de novo review of Petitioner's case was error by the trial court. Daniel, 839 F. 2d at 267. Although Petitioner implies that he is entitled to a de novo trial to determine his eligibility to receive pension benefits, he does not offer a single argument, nor does he cite a single case, to support his position.

In contrast, there is established precedent in the Sixth Circuit and other

courts of appeals holding that a trial court is not to hold a de novo factual hearing on the question of an applicant's eligibility for benefits under a pension fund or other such trust funds. The Sixth Circuit has specifically rejected arguments that de novo review is proper in such cases. See Adcock v. Firestone Tire & Rubber Co., 822 F.2d 623, 626 (6th Cir. 1987). Other courts of appeals have also taken the same position. See Wardle, 627 F.2d at 824; Phillips v. Kennedy, 542 F.2d 52, 54 (8th Cir. 1976); Berry v. Ciba-Geigy Corp., 761 F.2d 1003, 1007 (4th Cir. 1985). Petitioner, therefore, was clearly not entitled to a de novo trial on the issue of his pension eligibility and the Sixth Circuit was correct in holding that such de novo review was error by the district court.

CONCLUSION

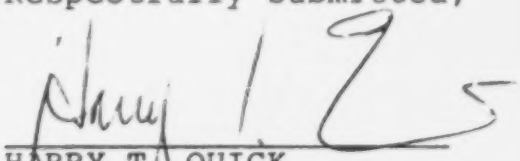
The Supreme Court long ago stated that petitions for certiorari should be granted only "in cases where there is a real and embarrassing conflict of opinion and authority between the Circuit Courts of appeals." Layne & Bowler Corp. v. Western Well Works, 261 U.S. 387, 393 (1923). Certiorari is not granted "merely to give the defeated party in the Circuit Court of Appeals another hearing." Magnum Import Co. v. Coty, 262 U.S. 159, 163 (1923). The Rules of the Supreme Court of the United States require Petitioner to demonstrate a "special and important" reason for the Court to grant certiorari, such as a conflict among the circuits. See Sup. Ct. R. 17.1(a).

Petitioner has failed to demonstrate a conflict of any kind, "embarrassing" or otherwise, among the circuits. He has

also failed to show any other "special and important reasons" for the Court to grant certiorari.

Therefore, because the courts of appeals are uniformly in agreement on the issue of a beneficiary's right to a jury trial in a suit for pension benefits, and because Petitioner has no right to a de novo trial, Petitioner's Writ of Certiorari should be denied.

Respectfully submitted,



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Dated: July 14, 1988

CERTIFICATE OF SERVICE

A copy of this Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of appeals for the Sixth Circuit was sent by regular U.S. mail, postage prepaid, to Hollis L. Searcy, Esq. and Richard L. Masters, Esq., AMSHOFF, AMSHOFF & SEARCY, Attorneys for Petitioner, 1012 S. Fourth Street, P. O. Drawer 2848, Louisville, Kentucky 40201, this 14th day of July, 1988.

HARRY T. QUICK

NO. 87-2063

Supreme Court, U.S.
FILED
SEP 23 1988
JOSEPH E. SPANIOL, JR.
CLERK

IN THE

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OCTOBER TERM, 1988

CHARLES DANIEL . . . . . PETITIONER

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ON PETITION FOR A WRIT OF
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COURT OF APPEALS FOR THE SIXTH CIRCUIT

PETITIONER'S REPLY TO BRIEF IN OPPOSITION

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PETITIONER'S REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

In his Petition for a Writ of Certiorari, Petitioner Charles Daniel respectfully asks that this Court answer a question upon which Courts of Appeals have expressed divergent opinions and has District Court judges in a

state of confusion: under what circumstances is a plaintiff, who seeks legal relief under the Employment Retirement Income Security Act of 1974, 29 U.S.C. §1001 et.seq. ("ERISA"), entitled (by the Seventh Amendment or otherwise), to a jury trial? In the case at bar, Charles Daniel was denied any administrative review of his entitlements and presented a clear de novo factual dispute in the United States District Court. Nonetheless, he was denied a jury trial.

ARGUMENTS

I. CONTARY TO THE STATEMENTS OF EATON IN ITS BRIEF IN OPPOSITION TO THE PETITION FOR CERTIORARI, THE CIRCUIT COURTS OF APPEAL HAVE EXPRESSED DIVERGENT OPINIONS OVER THE AVAILABILITY OF A JURY TRIAL UNDER ERISA.

Respondent attempts to eliminate any conficts among the Courts of Appeal on this

issue primarily by citing a line of cases following Wardle v. Central States, Southeast and Southwest Areas Pension Fund, 627 F.2d 820 (7th Cir. 1980), cert. denied, 449 U.S. 1112 (1981). However, Petitioner challenges this perception of harmony and will reveal that conflicting decisions have been rendered by the Second, Third, and Fifth Circuits. Even the Sixth Circuit in the opinion below leaves the door open for jury trials in some ERISA cases.

One such case Respondent cites is Calamia v. Spivey, 632 F.2d 1235 (5th Cir. 1980), where the complainant asked for a declaration of future entitlements under a pension. The court correctly determined that such a claim was traditionally equitable and should be decided by a judge and not a jury. However,

"[w]hen the Fifth Circuit said 'that ERISA does not entitle the appellant [Calamia] to jury trial' (632 F.2d at 1237), it was not holding that no ERISA claims, even a purely legal claim, can ever require a jury trial. In Calamia, the Seventh Amendment is not mentioned once. In Calamia, the Fifth Circuit simply does not discuss the serious constitutional issue which would have been presented if Calamia's claim had been of the traditional 'legal' or 'common law' variety" (quoting Whitt v. Goodyear Tire & Rubber Co., 676 F. Supp. 1119, 1123 (N.D. Ala. 1987).

Petitioner disagrees with Respondent's assertion that Katsaros v. Cody, 744 F.2d 270 (2d Cir. 1984), cert. denied, sub nom., Cody v. Donovan, 469 U.S. 1072 (1984), is

controlling in the Second Circuit over two cases relied upon by Petitioner which grant jury trials in ERISA suits by beneficiaries for pension benefits: Pollock v. Castrovinci, 476 F. Supp. 606 (S.D.N.Y. 1979), aff'd without opinion, 622 F.2d 575 (2d Cir. 1980), and Paladino v. Taxicab Industry Pension Fund, 588 F. Supp. 37 (S.D.N.Y. 1984). Rather, Katsaros serves only to highlight the conficting opinions on this issue in the Second Circuit. Pollock cannot be reconciled with Katsaros "without acknowledging that Katsaros deals only with a claim for equitable relief. The Katsaros court said:

> There is no right to a jury trial of ERISA actions against pension fund trustees seeking the equitable remedy of restitution.

744 F.2d at 278 (quoting from Whitt at 676 F. Supp. at 1123). Whitt continues to state that

"[i]n Pollock, which was certainly not overruled by Katsaros, the Second Circuit had previously said:

> The litmus test for determining the right to a jury trial is whether the nature of the legal issues to be tried is 'legal' or 'equitable.'

476 F. Supp. at 608" (quoting from Whitt at 676 F. Supp. 1123).

Additional evidence of conflict is apparent in Abbarno v. Carborundum Co., 682 F. Supp. 179, 181 (W.D.N.Y. 1988), (beneficiaries could demand a jury trial because their claim was essentially legal), which notes that Katsaros "did not state that the claims therein involved and the claims in Pollock v. Castrovinci...were equitable simply because they were ERISA claims.... [I]t seems more appropriate to read Katsaros as establishing a

rule that ERISA actions can be tried to a jury provided the particular ERISA claim at hand is legal in nature...."

In Paladino, Judge Brient "refused to believe that congressional silence on the jury right issue in ERISA 'reflects an intention that suits for pension benefits by disappointed applicants are equitable.'" 588 F. Supp. at 40 (quoting from Wardle at 627 F.2d at 829).

Respondent's suggestion that Turner v. CF&I Steel Corp., 770 F.2d 43 (3d Cir. 1985), cert. denied, 474 U.S. 1058 (1986), shows unity on this issue is in error. In Turner, the Third Circuit:

> expressly adopted the defendant's reading of Wardle v. Central States, Etc., in its decision not to allow a jury trial in an ERISA action. The statement in Turner... that the...Second Circuit has held that jury trials are not available under subsection [502](a)(1)(B) cannot be supported.... [T]he Second Circuit did not go so far as to say that jury trials are not

> inappropriate in all ERISA actions. Absent some clearer statement from such court or from the United States Supreme Court regarding this issue, this Court opines that some ERISA actions maybe appropriately tried to a jury.

Abbarno, at 682 F. Supp. at 181. Further, even in the decision below, the Sixth Circuit acknowledged in Daniel v. Eaton, that "there may be actions under ERISA in which a jury trial is proper." 839 F.2d 263, 268 (6th Cir. 1988).

II. Divergent Opinions On This Issue And The "ERISA Quicksand" Necessitates A Clear Decision By The Supreme Court Concerning Petitioner's Right To A Jury Trial.

An analysis of the ERISA jury trial issue overlaps with the recurring question of the extent and effects of ERISA's pre-emption of state law claims.

This Court's recent decision in Mackey v. Lanier Collections Agency & Service, Inc.,

56 U.S.L.W. 4631 (No. 86-1387, June 17, 1988); further clarified the broad pre-emption provision of §514(a) of ERISA, 29 U.S.C. §1144(a), under which ERISA pre-empts all state laws which "relate to" any employee benefit plan, even if they are consistent with the substantive provisions of ERISA. District Court Judge Acker has referred to this widening" scope of pre-emptions as the "ERISA quicksand", Jordan v. Reliable Life Insurance Co., No. 88-AR-0543-S, Slip op. at 9 (N.D.Ala. Sept. 8, 1988), which has engulfed previous state law remedies.

The decisions reached by some courts in ruling there is no right to a jury trial in an ERISA cases are strangely inconsistent with the central policy goal of ERISA to "protect-...plan participants in employee benefit plans

and their beneficiaires...by providing appropriate remedies, sanctions, and ready access to the federal courts." Southern California Meat Cutters Unions and Food Employees Pension Fund v. Investors Research Co., 687 F. Supp. 506 (C.D.Cal. 1988) (citing 29 U.S.C. §1001(b). In addition, the matter is further complicated by the fact that ERISA does not expressly address the jury trial issue. Therefore, judges at both District and Court of Appeals levels are in turmoil, and are often "torn between [their] duty to dance to the beat of the nearer drum sounded by [their circuit] in a case directly on point, and [their] court's duty to dance to the beat of the Supreme Court's louder, more powerful drum in a non-ERISA case dealing more broadly with

the Seventh Amendment's guarantee of a jury trial in any congressionally-created cause of actions in which the creating statute is silent as to the right to a jury trial of a traditionally jury-type claim." Jordan, No. 88-AR-0543-S, Slip. op. at 10. Clearly, ERISA should be interpreted to expand, not limit the scope of recovery allowable to participants, by permitting a jury to resolve issues of fact, lest pre-emption actually serve to strip the beneficiary of the right to have a jury resolve factual issues.

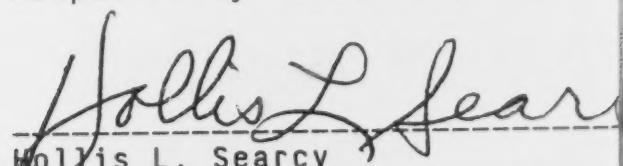
Interestingly, the Whitt court commented that "[w]hile ERISA pre-empts state law claims, it does not preclude concurrent state court jurisdiction over ERISA claims. As yet, neither Congress nor any federal court has

instructed any state court that it may not try an ERISA dispute without a jury." 676 F. Supp. at 1131-32.

CONCLUSION

For all the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Respectfully submitted,



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A copy of the Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit was sent by regular U.S. mail, postage prepaid, to Harry T. Quick, BENNETT, FRIEDLANDER, COPLAN & ARNOFF, 1100 Citizens Building, 850 Euclid Avenue, Cleveland, Ohio 44114, this 22nd day of September, 1988.

Hollis L. Searcy